No. 89-1097

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,
Cross-Petitioner,

v.

FOLDING CARTON RESERVE FUND, *et al.*

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT BRIEF OF PETITIONERS-CROSS-RESPONDENTS IN OPPOSITION TO GOVERNMENT'S CROSS-PETITION FOR CERTIORARI

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REASONS FOR DENYING THE CROSS-PETITION

1. The Cross-Petition candidly admits that the Government does not view the issues in this case as deserving of review. The Government filed no petition for certiorari of its own within the time provided by the rules. It urges denial of the principal Petitions, recognizing that such action would require denial of its Cross-Petition. Its Cross-Petition appears to be merely a tactical device to permit it to file an opposition to our Petitions, something which it is otherwise in no position to do.

Pointedly, the Government's Cross-Petition does not seek to obtain any funds for itself. The Government has no standing, and it cannot manufacture standing

by filing a Cross-Petition which it urges the Court to deny. The Cross-Petition is not a genuine request for review and should be denied.

2. The Government argues that this case involves an estoppel issue of consequence. But estoppel is not at issue here. The district court determined that the Government's petition for leave to intervene under rule 24(a) of the Federal Rules of Civil Procedure to enforce the claimed "escheat" was not "timely" within the meaning of rule 24, in light of the criteria established in *United States* v. *Kemper Money Market Fund, Inc.*, 704 F.2d 389 (7th Cir. 1983).[1]

In so holding, the district court found that the Government had been notified of its possible interest by December 1984. On six other occasions before April 1, 1985, the Government had received further notice of the proposed settlement by letter, telephone, official notice and face-to-face conversations. The Government also received notice of the March 27, 1985 hearing at which any objections to the settlement agreement were to be heard. The Government de-

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[1] In that case, the Seventh Circuit said that a court should consider several factors in deciding whether an intervention motion is timely, including:

> the length of time the intervenor knew or should have known of her or his interest in the case; the extent of prejudice to the original litigating parties from the intervenor's delay; the extent of prejudice to the would-be intervenor if her or his motion is denied; and any unusual circumstances.

704 F.2d at 391. *See also NAACP* v. *New York*, 413 U.S. 345 (1973); *City of Bloomington, Indiana* v. *Westinghouse Electric Corp.*, 824 F.2d 531 (7th Cir. 1987).

clined to appear and advised the court that it had no objection to the settlement.[2]

In considering the timeliness of the Government's application, the district court also determined that the Government's intervention at that late date would have caused substantial prejudice to the parties. By the time the Government sought to overturn the settlement, the petitions in this Court had been withdrawn in reliance upon the settlement,[3] over $2,000,000 had been distributed to some 2,700 individual members of the plaintiff class, and hundreds

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[2] The Cross-Petition suggests, but does not state, that the U.S. Attorney's Office in Chicago did not consult the Department of Justice in Washington. (Cross-Petition at 4-5.) However, as both lower court opinions pointed out, the internal Justice Department regulation regarding consultation is not on its face applicable to this situation which involves no claim by or against the Government. Moreover, this Court must proceed on the presumption of regularity—that any necessary intragovernmental communication took place. This inference is further warranted by the fact that the Government, although invited by the district court to do so, declined to present any evidence on this point.

[3] Judges Robson and Will and the other petitioners would have been prejudiced by the Government's tardy intervention to reopen the settlement because they had withdrawn their petitions for review in this Court, in reliance upon the settlement and the U.S. Attorney's representations that the Government had no interest in challenging it. The Government asserts in its Cross-Petition that even if such reliance caused the withdrawal of the petitions, "there was a very slim chance of such review being granted, and an even lower likelihood that the challenged judgment would have been reversed." (Cross-Petition at 6, n.4.) To our knowledge, this is the first time that the Solicitor General has shared with this Court his prognostications concerning the manner in which the Court would have exercised its certiorari jurisdiction.

of hours had been expended by attorneys, employees and accountants for the claimants, the Administration Committee, and the court, as well as the representatives of the six law schools that applied for grants.

The district court also found that there were no unusual circumstances justifying the Government's long delay. Accordingly, it determined that the attempt to intervene was untimely, simply too late. (Appendix J to Petition of Petitioner Hubert L. Will, at 21j-22j.) The word "estoppel" does not appear in the district court's opinion.

Surely the Government does not and cannot contend that it is immune from the temporal requirements of the Federal Rules. Some rules do provide the Government with additional time to perform certain acts, but rule 24 is not one of them. An application to intervene—by anyone—must be timely, and the Government's application certainly was not.

The court of appeals affirmed the district court's ruling, finding that the Government's application was not timely. (App. B, at 13b.) In its analysis, it also referred to the doctrine of estoppel, but its affirmance of the district court's denial of the intervention motion is amply supported by the Government's lack of timeliness. *Office of Personnel Management* v. *Richmond*, *cert. granted*, No. 88-1943, which is solely an estoppel case with no issue of timeliness under rule 24, thus has no bearing here, and the Court need not await the outcome of that case to dispose of the Government's Cross-Petition.[4]

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[4] The Government contends, somewhat curiously, that its own estoppel issue is moot because of the operation of rule 71 of

3. The Cross-Petition also fails entirely to address the issue that was central to the Government's purported interest in this case: whether the *Folding Carton* residual settlement fund should escheat to the federal government pursuant to 28 U.S.C. §§ 2041-42.

For a variety of reasons, we suggest that, as both lower courts found, such an "escheat" theory is untenable: (1) Section 2042 provides not for an escheat—a reversion of the funds to the federal treasury—but only for a deposit with a stakeholder pending later disbursements on court order. (2) The $200,000,000 *Folding Carton* settlement fund was never paid into any court, but was maintained in an escrow account and invested with court approval, earning over $30,000,000. (3) There were no unclaimed funds, but rather funds claimed by both plaintiffs and defendants in the class action and awaiting judicial disposition.

The "escheat" theory was abandoned by the court of appeals in the decision below, and was not raised by the Government in an original petition for certiorari. It is not deserving of this Court's further attention.

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the Federal Rules of Civil Procedure, but does not seek certiorari in connection with the latter, perhaps in part because it failed to make the argument below. Accordingly, there appears to be no reason for this Court to concern itself with rule 71. In any event, we note that the Government sought leave in 1987 to intervene in the district court because that was the only way it could participate in the case and assert its purported interest. The Government was not a party, and instead of asserting any rights it might arguably have possessed under rule 71, it waived them by announcing in 1985 that it had no objection to the settlement.

CONCLUSION

The Court should deny the Government's Cross-Petition and grant Petitioners' Petitions.

Respectfully submitted,

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